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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 529

WILLIAM IRWIN DENNY, ET AL. (Rodney Browne Starr, Plaintiff No. 4.), *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

FRED W. SHIELDS
718 Queen Street
Alexandria, Virginia
Attorney for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2-4
Statement	4-5
Reasons For Granting The Writ	5-9
Conclusion	9
Appendix A	1a-6a

CITATIONS

CASES:

Carroll v. *United States*, 117 C. Cls. 53	6
Danielson v. *United States*, 121 C. Cls. 533	6
Galvan v. *Press*, 347 U.S. 522, 526-528	8
Sherfey v. *United States*, 141 C. Cls. 307, *cert. den.* 357 U.S. 926	6
United States v. *Congress of Industrial Organizations*, 335 U.S. 106, 112, 113	8
United States v. *Dickerson*, 310 U.S. 544, 562	8

STATUTES:

Act of May 7, 1932, c. 171, 47 Stat. 150	2-3, 4, 6, 9
Act of February 21, 1946, § 8(a), c. 34, 60 Stat. 26, 28	3-4, 6
Pay Readjustment Act of 1942, Paragraph 4, § 15, c. 413, 56 Stat. 359, 368	2, 4, 5, 6
Temporary Promotion Act of July 24, 1941, c. 310, 55 Stat. 603, 605	3, 5, 7
28 U.S.C. § 1255(1)	2

MISCELLANEOUS:

91 Cong. Rec. 10919, 10920	8
Hearings Before Senate Committee on Naval Affairs re S. 1405, 79th Cong., 1st Sess., pp. 2-4, 23	6, 8
S. Rept. No. 701, 79th Cong., 1st Sess., p. 7	8

IN THE

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No.

WILLIAM IRWIN DENNY, ET AL. (Rodney Browne Starr, Plaintiff No. 4.), *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Rodney Browne Starr, Plaintiff in the Court below, through his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case on July 12, 1963.

OPINION BELOW

The opinion of the Court of Claims (R. 62-66) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 12, 1963 (R. 62). The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTION PRESENTED

Whether a former enlisted man of the Regular United States Navy, who served as a commissioned officer in World War I, prior to November 12, 1918, and subsequently retired as a chief petty officer, and was advanced on the retired list to his war-time commissioned rank, pursuant to the Act of May 7, 1932, c. 171, 47 Stat. 150, is a commissioned officer on the retired list, and entitled upon his release from active duty after recall to active duty during World War II, with service as a temporary commissioned officer, to have his retired pay computed under the provisions of Paragraph 4 of § 15 of the Pay Readjustment Act of 1942, c. 413, 56 Stat. 359, 368.

STATUTES INVOLVED

The Act of May 7, 1932, c. 171, 47 Stat. 150, provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all warrant officers and enlisted men who served in the Army, Navy, Marine Corps, or Coast Guard of the United States during the World War or the Spanish-American War, and whose service during such war was creditable, and who have been or hereafter may be retired according to law, shall on the date of approval of this Act or upon retirement in the case of those now on the active lists of the services named herein, be advanced in rank on the retired list to the highest commissioned, warrant,

or enlisted grade held by them during such war: *Provided*, That nothing in this Act shall entitle any of the personnel described herein, while on active duty, to any other rank than that in which they were serving at the time of retirement: *And provided further*, That no increase in active or retired pay or allowances shall result from the passage of this Act.

Section 8(a) of the Act of February 21, 1946, c. 34, 60 Stat. 26, 28, amending § 10 of the Temporary Promotions Act of July 24, 1941, c. 310, 55 Stat. 603, 605, provides in material part as follows:

Sec. 10. (a) Personnel appointed or advanced under the authority of this Act may be continued in their temporary status during such period as the President may determine, but not longer than six months after the termination of war or national emergency or, in the case of reserve and retired personnel, not longer than the period herein specified or the date of release from active duty whichever is the earlier and in no case longer than six months after the termination of war or national emergency. *Upon the termination* of their temporary status such *personnel* on the active list of the Regular Navy and Marine Corps shall assume their permanent status and those *of the retired list* and of the respective Reserve Components, including the Fleet Reserve and Fleet Marine Corps Reserve, *shall have, when returned to an inactive status*, the highest grade and rank in which, as determined by the Secretary of the Navy, they served satisfactorily under a temporary appointment, unless entitled to the same or higher grade and rank pursuant to section 8 of this Act, as now or hereafter amended.

(b)(1) Personnel of the retired list *returned* to an inactive status with higher rank pursuant to subsection (a) shall receive retired pay computed

at the rate prescribed by law and applicable in each individual case but based upon such higher rank.

(c) Personnel of the classes described above who have been retired or released from active duty prior to February 21, 1946, shall be entitled to the benefits of this section *from the date of retirement or release from active duty,* as the case may be.

(d) Personnel accorded higher rank pursuant to this section shall, if subsequently assigned active duty, be recalled to active duty in the grades, ranks or ratings, with which they were retired or returned to an inactive status unless under other provisions of law they are entitled to higher grades, ranks, or ratings. (Emphasis added.)

Paragraph 4, § 15 of the Pay Readjustment Act of 1942, c. 413, 56 Stat. 359, 368, provides as follows:

The retired pay of any officer of any of the services mentioned in the title of the Act who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provision of law, shall, unless such officer is entitled to retired pay of a higher grade, be 75 per centum of his active duty pay at the time of his retirement.

STATEMENT

The petitioner, a former enlisted man of the United States Navy, served as an enlisted man and a commissioned officer during World War I and prior to November 12, 1918; he subsequently was transferred to the Fleet Reserve; and after his retirement as a chief petty officer, he was, on February 19, 1934, advanced on the retired list to the rank of Lieutenant, junior grade, as provided by the Act of May 7, 1932, *supra;* on July 14, 1941, he was recalled to active duty as a chief petty

officer and served in that rate until June 22, 1942, when he received a temporary appointment as Lieutenant, junior grade, as authorized by the Temporary Promotions Act of 1941, *supra*; he thereafter received successive temporary promotions, attaining the rank of Lieutenant Commander; on August 30, 1946, he was released from active duty and returned to an inactive status on the retired list. After his release from active duty he was advanced on the retired list to the rank of Lieutenant Commander, and has received retired pay based upon the rank of a Lieutenant Commander credited with his years of active service. In his action in the Court below he sought to recover the difference in the retired pay received by him, and retired pay based upon 75 per cent of the pay he was in receipt of at the time of his release from active duty, as provided by Paragraph 4 of § 15 of the Pay Readjustment Act of 1942, *supra*.

The Court below held that the plaintiff was not entitled to have his pay computed under the provisions of Paragraph 4 of § 15 of the Pay Readjustment Act of 1942, *supra*, because he was not "re-retired" as an officer, but instead had reverted to an enlisted status on the retired list, and then been advanced to commissioned officer rank.

REASONS FOR GRANTING WRIT

1. The Court below has so far departed from the accepted and well-defined principles of statutory construction as to necessitate the exercise of this Court's jurisdiction to obviate a patent injustice to the petitioner and others similarly situated.

The Court below has repeatedly held that commissioned officers retired from military service prior to

World War II who were recalled to active duty during that war, were, upon release from active duty "re-retired", and entitled to retired pay as provided by Paragraph 4 of § 15 of the Pay Readjustment Act of 1942, *supra*. *Carroll* v. *United States*, 117 C. Cls. 53; *Danielson* v. *United States*, 121 C. Cls. 533; *Sherfey* v. *United States*, 141 C. Cls. 307, *cert. den.* 357 U.S. 926. It, however, held that petitioner, upon his release from active duty had not been returned to the retired list in the commissioned rank which Congress had provided he held under the provisions of the Act of May 7, 1932, *supra*, but instead had "reverted" to a non-existent status of enlisted man on the retired list, and had subsequently been advanced on the retired list to his highest commissioned rank. The construction the Court below gave the Act of May 7, 1932, *supra*, effectively destroyed the status which the Congress had specifically provided that the petitioner should have on the retired list.

2. Even if it be assumed *arguendo* that the Court below correctly held that the plaintiff retained a permanent status as an enlisted man on the retired list, despite the provisions of the Act of May 7, 1932, *supra*, the construction it placed on the Act of February 21, 1946, *supra*, not only fails to give effect to the plain language of the statute, but also disregards completely its legislative history, which clearly shows that the Congress did not intend to discriminate between enlisted men advance to temporary commissioned rank, and officers advanced to higher temporary commissioned rank. During the hearings before the Senate Committee on Naval Affairs on S. 1405, 79th Cong., 1st Sess., which ultimately was enacted as the Act of February 21, 1946, the Chief of Naval Personnel, Admiral Denfield,

made the following statement, at p. 23, regarding the changes incorporated in former Section 10 of the 1941 Act by the amendatory Act:

> "[p. 23] *Admiral Denfield.* * * * the bill authorizes enlisted men who served in commissioned grades during the war to have their highest rank or rating held during the war upon their transfer to the Fleet Reserve or on release to inactive duty if already in the Fleet Reserve; this same highest rank or rating is provided for Reserve officers on release to inactive duty *and to retired officers and men on their return to inactive status*, and to officers and men of the Regular Navy when subsequently retired. Retired pay is based on the highest rank or rating held." (Emphasis supplied.)

Admiral Herbert G. Hopwood appeared before the Senate Naval Affairs Committee on November 6, 1945, and, at pp. 2-4, said:

> "[p. 2] *Admiral Hopwood.* At the first hearings before this committee it appeared to be the sense of the committee that we consider the overall problem of retirement of personnel including the retirement of enlisted men who served in higher commissioned grades during the war.
>
> "*The Chairman.* Yes.
>
> "*Admiral Hopwood. And thereupon we rewrote the bill to include in like manner throughout, retirement provisions which authorized enlisted personnel when they retire to retire with the highest rank held during the war and with retired pay based on that rank.*
>
> "*The Chairman. The same as officers?*
>
> "*Admiral Hopwood.* Yes, sir.
>
> "*The Chairman. The same as regular officers?*
>
> "*Admiral Hopwood. This would be a new feature; yes, sir.* (Emphasis added.)

* * * *

"[p. 4] *The Chairman.* Now our objective is to, as near as possible, treat enlisted men to the same as officers?

"*Admiral Hopwood.* Yes, sir.

"*The Chairman.* How is that accomplished in these provisions?

"*Admiral Hopwood.* We think that is accomplished under the provisions of the committee reprint No. 2 that we have here.

"*The Chairman.* What section?

"*Admiral Hopwood.* Section 8 of the bill, sir."

See also in this connection, the discussion of the amended Section 10 appearing in Senate Report No. 701, 79th Cong., 1st Sess., page 7, and debate in the Senate, 91 Cong. Rec. 10919, 10920.

It, of course, is elementary that an act should be construed in a manner to effect the intent of the legislature as disclosed by the legislative background of the Act. Cf. *United States* v. *Dickerson*, 310 U.S. 544, 562; *Galvan* v. *Press*, 347 U.S. 522, 526-528; and *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, where, at pp. 112, 113, this Court said:

> "The purpose of Congress is a dominant factor in determining meaning. There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged. Remedial laws are to be interpreted in the light of previous experience and prior enactments. Nor, where doubt exists, should we disregard informed congressional discussion."

3. The decision of the Court below affects the status and retired pay of more than 100 former retired enlisted men of the Regular United States Navy who served their country as officers during World War I, who were advanced on the retired list to commissioned

status under the provisions of the Act of May 7, 1932, *supra*, and who were subsequently recalled to active duty and received temporary appointments to commissioned rank in the Regular Navy, and, upon release from active duty, were returned to the retired list or should have been returned to the retired list of the Regular Navy with the highest rank in which they had satisfactorily served as determined by the Secretary of the Navy. As the Court below has sole jurisdiction of this type of action, petition to this Court for grant of writ of certiorari is the only method by which review of the decision of the Court below can be obtained.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for grant of certiorari should be granted.

FRED W. SHIELDS
718 Queen Street
Alexandria, Virginia
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 543—59

(Decided July 12, 1963)

WILLIAM IRWIN DENNY, ET AL.,

v.

THE UNITED STATES

Fred W. Shields for plaintiff. *Thomas M. Gittings, Jr.* and *King & King* were on the briefs.

Edgar H. Twine, with whom was *Assistant Attorney General John W. Douglas* for defendant.

Before WHITAKER, *Acting Chief Judge*, REED, *Justice (Ret.)* sitting by designation, LARAMORE, DURFEE and DAVIS, *Judges*.

ON PLAINTIFF, RODNEY BROWNE STARR'S MOTION AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

DURFEE, *Judge*, delivered the opinion of the court:

Plaintiff Rodney Browne Starr (No. 4) is receiving retired pay computed on the basis that he retired as an enlisted man. He sues to recover the additional amount of retired pay he would receive if it were computed under paragraph 4, § 15 of the Pay Readjustment Act of 1942, 56 Stat. 359, 368, applicable only to men retired as officers. This is another case in line with our recent decisions in *Richard L. Jones v. United States*, Ct. Cl. No. 300—56, decided October 5, 1960, 282 F. 2d 906, *cert. denied* 365 U.S. 880 (1961); *Leonard James Hoag, et al. v. United States*, Ct. Cl. No. 544—59; and *John William Wilson, et al. v. United States*, Ct. Cl. No. 39—60—the last two having been decided on June 7, 1963. We must now determine if this plaintiff was retired as an officer in 1946, and entitled to have his pay computed as such.

Mr. Starr enlisted in the United States Navy in 1903, and retired on February 1, 1934, as a chief petty officer. On February 19, 1934, he was advanced on the retired list to an officer's rank, lieutenant (j.g.), pursuant to the Act of May 7, 1932, 47 Stat. 150. This legislation provided as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all warrant officers and enlisted men who served in the Army, Navy, Marine Corps, or Coast Guard of the United States during the World War or the Spanish-American War, and whose service during such war was creditable, and who have been or hereafter may be retired according to law, shall on the date of approval of this Act or upon retirement in the case of those now on the active lists of the services named herein, be advanced in rank on the retired list to the highest commissioned, warrant, or enlisted grade held by them during such war: *Provided*, That nothing in this Act shall entitle any of the personnel described herein, while on active duty, to any other rank than that in which they were serving at the time of retirement: *And provided further*, That no increase in active or retired pay or allowances shall result from the passage of this Act.

On July 14, 1941, plaintiff was recalled to active duty as a chief petty officer, his enlisted man's rating, and he served in this enlisted rank until June 22, 1942, when he received a temporary appointment to lieutenant (j.g.), under the Temporary Promotions Act of July 24, 1941, 55 Stat. 603. Plaintiff received further temporary appointments under the 1941 statute, until August 30, 1946, when he again retired from The United States Navy.

As stated in the *Jones* case, *supra*, a promotion given under the Temporary Promotions Act of 1941, expires on the day the appointee terminates his active duty. He then reverts to and retires in his prior, permanent rank. Jones reverted to, and therefore retired in his prior en-

listed rank of chief quartermaster. He was not entitled to have his retired pay computed under paragraph 4, of § 15 of the Pay Readjustment Act of 1942, *supra*, because he did not *retire* as an officer. His subsequent *advancement* on the retired list to commissioned rank was not the equivalent of *retirement* in such commissioned rank. Plaintiff Starr's prior permanent rank was that of chief petty officer, the enlisted rank in which he was recalled to active duty in 1941, and in which he served for over eleven months thereafter, and his case is governed by the *Jones* decision, *supra*. This enlisted status is the rank to which he reverted in 1946, the rank in which he retired, and therefore he is not entitled to have his retired pay computed under the Pay Readjustment Act of 1942. Mr. Starr did not retire as an officer; his case is not governed by the *Hoag* decision, *supra*.

John Joseph Queeney was the plaintiff in *Hoag*. Like the plaintiff Jones in the 1960 decision, Queeney had received a temporary appointment under the 1941 Act. They both retired after the second World War and reverted to their former enlisted ratings. They both were subsequently advanced on the retired list to commissioned rank, the highest ranks in which they had served on active duty under temporary appointments. Unlike Jones however, Queeney was recalled to active duty in 1950, some three years after his advancement on the retired list. This last recall to duty and subsequent re-retirement in 1953, altered Queeney's position. We held that he was now entitled to the benefits of the Pay Readjustment Act of 1942 because in 1953 he retired as an officer. The rank to which Queeney reverted in 1953 was the commissioned rank given him by advancement on the retired list in 1947, under section 10(a) of the Temporary Promotions Act of 1941, *supra*, as amended, Act of February 21, 1946, 60 Stat. 26, 28. This advancement was a real, permanent appointment to that status. Unlike the promotion given on active duty under the Act, the advancement given the retired serviceman

under section 10(a), as amended, *supra*, is in no way temporary. Section 10(a) provides that the retiree shall be advanced and "shall have, * * * the highest grade and rank in which * * * [he] served satisfactorily under a temporary appointment, * * *." We quoted this in *Hoag*, and then we stated:

> The Congress determined that he "shall have" that rank (by advancement on the retired list.) In the *Jones* case we stated that the serviceman is not retired in his temporary rank, but after retirement "he would then 'have' the higher grade and emoluments flowing therefrom." [Slip op. p. 8]. There are no conditions or limitations on these statements. We have no reason to imply them. So far as we can determine from the statutory language, this is the new status the Congress meant to give such men. If recalled to active duty, they must be recalled in their advanced status. [§ 10(d), Temporary Promotions Act, *supra*.] Accordingly, when plaintiff was recalled to active duty in 1950, he was recalled *as an officer*. [Slip op. p. 5.] (Words in the parenthesis are added.)

There is an apparent similarity between Queeney in the *Hoag* case, and plaintiff at bar. Starr was also advanced on the retired list to an officer's rank, but in 1934 under the Act of May 7, 1932, *supra*. But the similarity ends there. The 1932 Act stated therein the "conditions or limitations" on that advancement not found in the Temporary Promotions Act of 1941. One proviso attached to the advancement under the 1932 Act deprived Starr of any increased pay, and more importantly, the other proviso took back the officer's rank in the event of recall to active duty. For plaintiff Starr, the advancement on the retired list was indeed temporary. On April 14, 1941, he was recalled to active duty as an enlisted man; ordered to serve in his enlisted rank, chief petty officer, and he continued in such rank on active duty until June 22, 1942. The *Hoag* decision stressed the point that Queeney "was recalled *as an officer*" in 1950. [Slip op. p. 5.] He was recalled in his

officer's rank; he served his entire tour of duty in his officer's rank; he retired as an officer in 1953. Queeney's advancement on the retired list under the 1941 statute constituted him an officer in every respect. He did not lose his commission when he returned to active duty.

The advancement on the retired list given to plaintiff Starr and others under the 1932 Act seems to be, then, in the words of the *Hoag* case, "a gloss, put over a lower, still permanent rank." [Slip op. p. 5.] This is not to detract from the dignity of the men so commended. It is a bright and honorable luster. The Congress gave form to the respect and gratitude it had for the service these men gave to our country. But the fact remains that the advancement was an honorarium only. The lower ranks held by these men were not extinguished. If and when they were called to return to the colors, they would return in their lower permanent rank. The debate on the floor of the House of Representatives preceding the enactment of the Act of May 7, 1932, lends further weight to this view of the advancement.

> MR. KAVALE: This (advancement) refers only to retirement rank and in no way relates to retirement pay. It will not cost the Treasury a cent, but will merely give this honorary title to these men. They have earned those titles. [75 Cong. Rec. 8421 (1932).]

When plaintiff Starr retired in 1946 his temporary appointment under the Temporary Promotions Act of 1941 terminated, and he reverted to the same status he held before he was recalled to active duty in 1941. His status was that of an enlisted man holding an honorary officer's rank on the retired list. It was not a permanent officer's rank. It was not an officer's rank in which he could retire in 1946. It did not extinguish his enlisted man's rank. Plaintiff, therefore, retired as an enlisted man on August 30, 1946, and he is not entitled to have his pay computed under

paragraph 4 of § 15 of the Pay Readjustment Act of 1942, *supra*. *Jones* v. *United States*, *supra*.

Plaintiff's service record (Def. Exh. No. 5), is evidence in support of this conclusion. It states:

> * * * Released from all active duty on 29 August 1946, at the expiration of two months and 28 days leave and reverted to his permanent enlisted rating as a CGM (PA) USN (Ret.)

Defendant's motion for summary judgment is granted and plaintiff's similar motion is denied. The petition of Rodney Browne Starr (No. 4) is dismissed.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	6
Argument	8
Conclusion	10

CITATIONS

Cases:

Jones v. *United States*, 151 C. Cls. 119, 282 F. 2d 906, certiorari denied, 365 U.S. 880	8, 9

Statutes:

Act of May 7, 1932, 47 Stat. 150	2, 6, 10
Act of February 21, 1946 (P.L. 305), Section 8(a), 60 Stat. 28, amending Section 10 of the Act of July 24, 1941	4
Pay Readjustment Act of 1942, 56 Stat. 359, 368; 37 U.S.C. 115; Section 15, Paragraph 1	6, 7, 8, 9
Temporary Promotions Act of July 24, 1941, 55 Stat. 603-605:	
Section 2	3, 7
Section 7(a)	3
Section 10	4
Section 10 (a)	7, 8-9
Section 10(b)	7, 9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 529

WILLIAM IRWIN DENNY, et al.
(RODNEY BROWNE STARR, PLAINTIFF No. 4),
PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-6a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 12, 1963 (Pet. App. 1a). The petition for a writ of certiorari was filed on October 9, 1963. The

jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a retired Navy enlisted man, who is recalled to active duty and temporarily promoted to Lieutenant Commander under the provisions of the Temporary Promotions Act and then released from active duty, is entitled to have his retired pay computed under the Pay Readjustment Act of 1942.

STATUTES INVOLVED

The Act of May 7, 1932, 47 Stat. 150, provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all warrant officers and enlisted men who served in the Army, Navy, Marine Corps, or Coast Guard of the United States during the World War or the Spanish-American War, and whose service during such war was creditable, and who have been or hereafter may be retired according to law, shall on the date of approval of this Act or upon retirement in the case of those now on the active lists of the services named herein, be advanced in rank on the retired list to the highest commissioned, warrant, or enlisted grade held by them during such war: *Provided*, That nothing in this Act shall entitle any of the personnel described herein, while on active duty, to any other rank than that in which they were serving at the time of retirement: *And provided further*,

That no increase in active or retired pay or allowances shall result from the passage of this Act.

The Temporary Promotions Act of July 24, 1941, 55 Stat. 603-605, provides in pertinent part as follows:

* * * * *

Sec. 2. (a) As used in this Act, the words "temporarily appointed" shall be interpreted to mean also "temporarily promoted" or "temporarily advanced in rank", as the case may be.

(b) The following personnel may be temporarily appointed to ranks or grades in the Regular Navy or Marine Corps, not above lieutenant in the Navy and captain in the Marine Corps:

* * * * *

(3) First-class petty officers and above in the Regular Navy and platoon or staff sergeants and above in the Regular Marine Corps, including enlisted men of those grades on the retired list on active duty.

(4) Enlisted men of the Fleet Reserve and the Fleet Marine Corps Reserve on active duty in the grades herein specified for enlisted men of the Regular Navy or Marine Corps.

* * * * *

Sec. 7. (a) The permanent, probationary, or acting appointments of those persons temporarily appointed in accordance with the provisions of this Act shall not be vacated by reason of such temporary appointments, such persons shall not be prejudiced thereby in regard to promo-

tion, advancement, or appointment, in accordance with laws relating to the Regular Navy or Marine Corps, and their rights, benefits, privileges, and gratuities shall not be lost or abridged in any respect whatever by their acceptance of commissions or warrants hereunder; * * *.

* * * * *

Sec. 10. Personnel appointed or advanced under the authority of this Act may be continued in their temporary status during such period as the President may determine, but not longer than six months after the termination of war or national emergency. Upon the termination of their temporary status such personnel shall, unless otherwise provided herein, revert to their permanent grades, ranks, or ratings, but upon being subsequently retired or in the case of retired officers returned to an inactive status, they shall, on condition that their performance of duty under such temporary appointments has been satisfactory, be placed on the retired list, or advanced thereon as the case may be, with the highest rank held by them while on active duty: *Provided*, That except where specific provision is made otherwise, their retired pay shall be based on the pay of the rank or rating held at the time of retirement: *Provided further*, That nothing in this Act shall entitle such personnel, when recalled to active duty, to any other rank or rating than that in which they were serving at the time of retirement.

Section 8(a) of the Act of February 21, 1946 (P.L. 305), 60 Stat. 28, amending Section 10 of the Act of July 24, 1941, *supra*, provides in pertinent part as follows:

Sec. 8. (a) Section 10 of the Act approved July 24, 1941 (55 Stat. 605), is hereby amended to read as follows:

"Sec. 10. (a) Personnel appointed or advanced under the authority of this Act may be continued in their temporary status during such period as the President may determine, but not longer than six months after the termination of war or national emergency or, in the case of reserve and retired personnel, not longer than the period herein specified or the date of release from active duty whichever is the earlier and in no case longer than six months after the termination of war or national emergency. Upon the termination of their temporary status such personnel on the active list of the Regular Navy and Marine Corps shall assume their permanent status and those of the retired list and of the respective Reserve Components, including the Fleet Reserve and Fleet Marine Corps Reserve, shall have, when returned to an inactive status, the highest grade and rank in which, as determined by the Secretary of the Navy, they served satisfactorily under a temporary appointment, unless entitled to the same or higher grade and rank pursuant to section 8 of this Act, as now or hereafter amended.

"(b) (1) Personnel of the retired list returned to an inactive status with higher rank pursuant to subsection (a) shall receive retired pay computed at the rate prescribed by law and applicable in each individual case but based upon such higher rank.

* * * * *

"(d) Personnel accorded higher rank pursuant to this section shall, if subsequently assigned

active duty, be recalled to active duty in the grades, ranks or ratings, with which they were retired or returned to an inactive status unless under other provisions of law they are entitled to higher grades, ranks, or ratings. * * *"

* * * *

Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942, 56 Stat. 359, 368; 37 U.S.C. 115, provides as follows:

> The retired pay of any officer of any of the services mentioned in the title of this Act who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provision of law, shall, unless such officer is entitled to retired pay of a higher grade, be 75 percentum of his active duty pay at the time of his retirement.

STATEMENT

The facts before the Court of Claims were not in dispute and may be summarized as follows: Petitioner entered active duty in the United States Navy on February 3, 1903 as an enlisted man. After receiving a temporary appointment as Lieutenant (j.g.), he was retired as a chief petty officer on February 1, 1934. Eighteen days later, petitioner was advanced on the retired list to the rank of Lieutenant (j.g.) as provided by the Act of May 7, 1932, *supra*.

On July 14, 1941, petitioner was recalled to active duty as a chief petty officer and subsequently received successive temporary appointments as authorized by

Section 2 of the Temporary Promotions Act of 1941, *supra*. After having been temporarily appointed to the rank of Lieutenant Commander, on August 30, 1946, he was released from active duty and returned to inactive duty on the Retired List (Pet. 4-5).

In accordance with the provisions of Section 10(a) of the Temporary Promotions Act of 1941, as amended, petitioner's temporary appointment to the rank of Lieutenant Commander was terminated at the time of his release from active duty and he reverted to his permanent enlisted rating of chief petty officer. Under the authority of the same section, however, he was subsequently advanced on the Retired List to the rank of Lieutenant Commander—the highest temporary rank in which he served satisfactorily, as determined by the Secretary of the Navy (Pet. 5).

Since petitioner's release from active duty in 1946, his retired pay has been computed, as provided by Section 10 (b)(1) of the Temporary Promotions Act of 1941, as amended, at the rate prescribed by statutes applicable to enlisted men, but based upon the monthly pay of his rank of Lieutenant Commander on the retired list. By his suit in the Court of Claims, petitioner sought to recover the difference between his present retired pay, which is computed upon the basis of approximately 60% of his active duty pay, as Lieutenant Commander, and retired pay as computed upon the basis of 75 per cent of his active duty pay as a Lieutenant Commander as provided in Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942.

On cross motions for summary judgment, the Court of Claims held that petitioner's retirement rights derive exclusively from Section 10(a) and 10(b) of the Temporary Promotion Act of 1941, and that he was not entitled to have his retired pay computed under the Pay Readjustment Act of 1942. Accordingly, the court granted the Government's motion for summary judgment and dismissed the petition (Pet. 5).

ARGUMENT

Following its previous decision in *Jones* v. *United States*, 151 C. Cls. 119, 282 F. 2d 906, certiorari denied, 365 U.S. 880, the Court of Claims has held that petitioner is not entitled to the retired pay benefits prescribed by Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942. This holding is based on a clearly correct construction and application of the pertinent statutory provisions. Accordingly, further review by this Court is not warranted.

Prior to his release from active Navy duty on August 30, 1946, petitioner was serving under a temporary appointment as a Lieutenant Commander pursuant to Section 10 of the Temporary Promotions Act of 1941. Section 10(a) of that Act specifically provided that petitioner's temporary appointment as an officer would terminate on the date of his release from active duty and that, upon the termination of his temporary status, he would assume his "permanent status," *i.e.*, his permanent enlisted status as a chief petty officer, retired. When he returned to an inactive status in accordance with Section 10(a),

petitioner was entitled to, and has been accorded, the highest rank on the retired list in which, as determined by the Secretary of the Navy, "[he] served satisfactorily under a temporary appointment * * *." And, by Section 10(b) of the Temporary Promotions Act of 1941, upon his return to an inactive status with the higher rank in which he served satisfactorily, petitioner was entitled to, and is receiving, "retired pay computed at the rate prescribed by law * * * but based upon [his] higher rank" as Lieutenant Commander.

Section 10 of the Temporary Promotions Act is, of itself, definitive and dispositive of petitioner's rights. His claim to the more remunerative benefits of Section 15, Paragraph 4, of the Pay Readjustment Act of 1942 is plainly without merit. Section 15, paragraph 4, applies only to officers of the Navy "hereafter retired." *Jones* v. *United States*, *supra*. After serving under a temporary appointment as an officer in the Navy, petitioner was released from active duty, but he was not and could not have been retired as an officer. It follows that the court below was correct in holding that, on the facts of petitioner's case, he does not qualify for retired pay pursuant to Section 15, Paragraph 4, of the Pay Readjustment Act of 1942.

The decision is not, moreover, at variance with the legislative history of the 1946 Amendment to the Temporary Promotions Act. Consistent with the import of petitioner's extracts from the committee hearings on the 1946 amendment, petitioner's service in the higher temporary rank of Lieutenant Commander

is recognized in the retired pay he currently receives pursuant to Section 10(b) of the Temporary Promotions Act. In addition, on the retired list he carries the highest rank held during the war. By the plain terms of the controlling statute, he is entitled to no more.[1]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
SAMUEL J. HEYMAN,
Attorneys.

NOVEMBER 1963

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[1] There is no basis for petitioner's reliance upon the fact that, at the time he was recalled to active duty in 1941, he was a lieutenant (j.g.) on the retired list. Contrary to his apparent belief, his rank on the retirement list was only temporary and was to be terminated upon recall to active duty. Act of May 7, 1932, *supra*, pp. 2-3. This statutory directive is reflected by his reentry on active duty as a chief petty officer, and not as a commissioned officer. In short, petitioner's permanent status throughout the period between 1934 (when he first retired) and 1946 was that of chief petty officer. It is also noteworthy that the 1932 Act, under which petitioner initially obtained commissioned status on the retired list, expressly provides that it was not to be used to effect an increase in retired pay.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 529

WILLIAM IRWIN DENNY, ET AL., (Rodney Browne Starr, Plaintiff No. 4.), *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

BRIEF FOR PETITIONER IN REPLY TO BRIEF OF THE UNITED STATES

FRED W. SHIELDS
718 Queen Street
Alexandria, Virginia
Attorney for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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While there is no dispute between the parties as to the actual facts in this case, there is a basic dispute between them with respect to the legal consequences stemming from those facts. Actually, the basic issue is a very narrow one and involves only the determination as to whether or not the petitioner was at the time of his recall to active duty a "retired Navy enlisted man" as respondent contends, or whether he was a Lieutenant (Junior Grade) on the retired list

as provided by the Act of May 7, 1932, *supra*, by virtue of his temporary service as an officer in World War I.

Actually respondent does not discuss this issue other than to state in the footnote appearing on page 10 of its brief that:

> "There is no basis for petitioner's reliance upon the fact that, at the time he was recalled to active duty in 1941, he was a lieutenant (jg.) on the retired list. Contrary to his apparent belief, his rank on the retirement list was only temporary and was to be terminated upon recall to active duty. Act of May 7, 1932, *supra*, pp. 2-3. This statutory directive is reflected by his reentry on active duty as a chief petty officer, and not as a commissioned officer. In short, petitioner's permanent status throughout the period between 1934 (when he first retired) and 1946 was that of chief petty officer. It is also noteworthy that the 1932 Act, under which petitioner initially obtained commissioned status on the retired list, expressly provides that it was not to be used to effect an increase in retired pay."

Respondent's contention overlooks and ignores the actual language of the Act of May 7, 1932, *supra*, as well as the effect of such language. Admittedly, petitioner was not, under the provisions of the Act of May 7, 1932, entitled to serve on active duty as a commissioned officer. However, the Act clearly gave him the status of a lieutenant (jg.) on the retired list and that status was a permanent status on the retired list. Certainly it cannot be contended that if the petitioner had not received a temporary appointment as a commissioned officer after his recall to active duty during World War II, but has served continuously on active duty after recall as a chief petty officer he would not

have, under the provisions of the Act of May 7, 1932, *supra*, been entitled to resume his status as a commissioned officer upon release from active duty after recall. On the contrary it is clear that in such a situation petitioner would have resumed his status as a commissioned officer on the retired list upon his release from active duty. If he had such status as a commissioned officer it is submitted that he would be entitled to the benefits of Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942, c. 413, 56 Stat. 359, 368, under the re-retirement principle established by the decisions of the Court of Claims in *Carroll* v. *United States*, 117 C. Cls. 53, and *Sherfey* v. *United States*, 141 C. Cls. 305, *cert. den.* 357 U.S. 926. The construction which respondent seeks to place upon the Act of May 7, 1932, results in making the provisions of the Act, for all practical purposes, a complete nullity and effecting no actual change in petitioner's status on the retired list.

The government made essentially the same contention with respect to the advancement of an officer on the retired list under the provisions of the Act of June 23, 1938, c. 598, 52 Stat. 949, as amended, 34 USC 1946 ed. 404(f), which provided:

> "All line officers of the Navy who have been specially commended for their performance of duty in actual combat by the head of the executive department under whose jurisdiction such duty was performed, when retired, except as provided in section 404(h) of this title, shall, upon retirement, be placed upon the retired list with the rank of the next higher grade and with three-fourths of the active-duty pay of the grade in which serving at the time of retirement."

The Court of Claims in *McColl* v. *United States*, 137 C. Cls. 337, held that the 1938 Act, as amended, gave an

officer so advanced a permanent status with the advanced rank on the retired list. The respondent made essentially the same contention with respect to individuals advanced on the retired list by virtue of a temporary appointment under the provisions of the Temporary Promotions Act of July 24, 1941, c. 320, 60 Stat. 28, who were recalled to active duty after such advancement on the retired list and again promoted while serving on active duty during recall. The Court of Claims, in the case of *John J. Queeney, Plaintiff #5* in *Leonard J. Hoag, et al.* v. *United States*, C. Cls. No. 544-59, decided June 7, 1963, held that the rank to which the plaintiff there had been advanced on the retired list was a permanent rank entitling him to the benefits of Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942, *supra*, when he was subsequently released from active duty after recall. No reason has been shown why the petitioner did not acquire the same permanent status on the retired list under the provisions of the Act of May 7, 1932, *supra*, as do individuals under the Act of June 23, 1938, *supra*, and the Temporary Promotions Act of 1941, as amended, *supra*.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for grant of certiorari should be allowed.

Fred W. Shields
718 Queen Street
Alexandria, Virginia
Attorney for Petitioner